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No. 88-1970

In The

Supreme Court of the United States

October Term, 1988

BURNING TREE CLUB, INC., et al.,

Petitioners,

v.

STATE OF MARYLAND, et al.,

Respondents.

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether by extricating itself from tax-subsidized, government-sanctioned sex discrimination, the State of Maryland has abridged or unconstitutionally conditioned any association rights of a sizable and influential all-male country club which had previously agreed to serve a public function for the State and to subject its membership policies to State regulation?

2. Whether legislative reinstitution of a 1974 ban on sex discrimination by tax-subsidized and State-regulated clubs that was invalidated because it contained an unconstitutional exemption for Burning Tree Club impermissibly impairs the Club's 1981 contract with the State?

3. When the issue was neither raised nor decided below, whether the Court should entertain the question of whether a taking occurs when the State denies tax support drawn from the contributions of all its citizens to a club whose discrimination against women undermines the public function it performs?

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BRIEF IN OPPOSITION

The State of Maryland, et al., Respondents, for reasons detailed herein, urge the Court to deny issuance of a writ of certiorari to the Court of Appeals of Maryland to review the judgment in *State v. Burning Tree Club, Inc.*, 315 Md. 254, 554 A.2d 366 (1989).

STATEMENT OF THE CASE

Since 1965, the State of Maryland has permitted certain country clubs to receive a unique statutory tax benefit. Designed "to provide open spaces" and "to prevent the forced conversion of . . . country clubs to more intensive or different uses," Preamble to Chapter 399, Laws of 1965, the law authorizes the State Department of

Assessments and Taxation to enter into agreements with country clubs for an initial term of "at least ten years" and subsequent extensions of "at least five years" to reduce the assessment and taxation of their land. Md. Code, Tax-Property Article, §8-213. Under the statute, if a club enters into and abides by the agreement, its land is assessed on the basis of its use as a country club and not on the basis of its highest and best use, *viz.* as if subdivided or more intensely developed. §8-213(a).

In Montgomery County – where the greatest number of beneficiaries of the tax break are located – most clubs entered into their initial agreements in 1965 and 1966 – 11 of them within one day of each other in December 1965.[1] One such club was Burning Tree, an all-male club, self-styled as the "Club of Presidents".[2]

Even before Maryland voters approved an Equal Rights Amendment ("ERA") in 1972, Md. Declaration of Rights, Article 46, some State legislators began to question the legality and propriety of conferring a preferential tax assessment on clubs that invidiously discriminated in their guest and membership policies.

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[1] Fewer than 25 clubs in Maryland receive the open space tax preference – a fraction of the clubs operating in the State.

[2] According to newspaper accounts, a trademark of the Club was its invitations to congressional leaders, cabinet members, ambassadors, and other high ranking officials to join the Club as honorary members or attend an annual cocktail party. *See* V. Churchville, "Burning Tree Tax Exemption Ruled Illegal", Washington Post, Sept. 14, 1984 at A1. Allegedly the first cabinet member excluded from this tradition was Ovetta Culp Hobby, Secretary of Health, Education and Welfare in the Eisenhower Administration. *Id.*

In 1971, State Senator Verda Welcome requested an opinion of the Attorney General on whether the tax preference set forth in the 1965 statute could be given to clubs discriminating on the basis of race. An opinion followed which pointed to cases whose reasoning "casts serious doubt on the constitutionality of granting tax preferences to private country clubs which practice racial discrimination." 56 *Opinions of the Attorney General* 468, 472 (1971). The following month Senator Welcome introduced legislation which would have denied a tax break to clubs that discriminate. Although the 1972 bill died, as did a 1973 measure, an anti-discrimination bill for recipients of the tax preference was enacted in 1974. Chapter 870, Laws of 1974.

The 1974 legislation prohibited certain clubs receiving the tax preference from discriminating in membership or guest privileges on the basis of race, color, creed, national origin, or sex. Tax-Property Article, §8-214. To enforce this anti-discrimination requirement, the statute charged the Attorney General with determining whether a club was engaging in any prohibited discrimination and, if a violation was found, the law triggered a process of hearings, consent agreements, and cease and desist orders that could lead to the loss of the tax preference.

Before passage of the 1974 legislation, in the closing days of the session, a last minute floor amendment was offered by a Montgomery County State Senator and adopted, adding the following language:

> The provisions of this section with respect to discrimination in sex do not apply to any club whose facilities are operated with the primary purpose, as

> determined by the Attorney General, to serve or benefit members of a particular sex nor to the clubs which exclude certain sexes only on certain days and at certain times.

At the time, Burning Tree was the only all-male club receiving a preferential tax assessment.

The new anti-discrimination law was immediately applied to clubs with existing agreements, *see State v. Burning Tree Club, Inc., supra,* 315 Md. at 266-67, and in the mid-seventies the Attorney General's Office began its investigation of all club recipients of the tax benefit.[3] Burning Tree – operating on an extension of its initial agreement – was investigated in 1977 and 1978, not only to determine whether it discriminated on the basis of race or religion, but also to determine whether it excluded women to such an extent that it was "operated with the primary purpose . . . to serve or benefit members of a particular sex" within the meaning of the exemption to the 1974 Act. On February 15, 1978, the Attorney General's Office advised the Club of its conclusion that "the facilities of Burning Tree have consistently been and presently are operated for the sole or primary purpose of serving the male sex."[4] Thus, under the 1974 statute, the

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[3] The refusal of certain clubs to cooperate in the investigation led the Attorney General to seek and obtain legislation expressly authorizing the issuing of subpoenas for members' records. Chapter 321, Laws of 1977. Tax-Property Article, §8-215(f).

[4] During the investigation, Burning Tree freely admitted that upon advice of counsel, it had deleted the references to "male" members from the club's constitution.

Attorney General's Office was able to find that Burning Tree "even though excluding women from membership and guest privileges, has not engaged in a pattern of discrimination based on sex."[5]

In ensuing years, some State legislators grew increasingly dissatisfied with the country club tax preference and the loopholes in the anti-discrimination scheme. From 1980 through 1985 more than 20 bills were introduced which would have scaled down or eliminated the tax break or toughened the law's anti-discrimination provisions.

While club legislation was being readied for introduction in 1981, various clubs in Montgomery County, including Burning Tree, apparently fearful of future changes in the law, unilaterally demanded and obtained extension of their assessment agreements for 50 years.

In 1983, the Montgomery County delegation voted to support a bill that would have removed a wide variety of tax benefits from discriminatory clubs, including Burning Tree. The Club opposed the bill, claiming it would impair its 50-year agreement with the State or "might force us into the position of becoming a rich man's club."[6] J. Feinstein, "Burning Tree Members Do Battle in Annapolis", Washington Post, April 6, 1983 at C1.[7] This

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[5] Since 1978, the Club has not been investigated with respect to any type of discrimination prohibited by the statute.

[6] In 1983, the Club's initiation fee was $12,000 and annual dues $1,700.

[7] Apparently because of this and other gaffes, *see* R. Melton, "Burning Tree Policy Evokes Bitter Debate: Blacks

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legislation passed both houses although in different versions. Because House-Senate conferees could not resolve their differences, the bill died on the last night of the Session.

After the failure of the 1983 legislation, Senator Stewart Bainum, a sponsor of past attempts to curb club discrimination, requested an opinion of the Attorney General on the constitutionality of the Burning Tree exemption. In August, 1983, the Attorney General concluded that the State was sufficiently involved in the discriminatory practices of Burning Tree to render the Club's exemption from the 1974 statute violative of the ERA. 68 *Opinions of the Attorney General* 164 (1983). Shortly thereafter, both the Attorney General and Senator Bainum brought suit against the Club. The Attorney General's suit was dismissed on standing grounds. *State v. Burning Tree Club*, 301 Md. 9, 481 A.2d 785 (1984). However, the *Bainum* suit went to the merits. On September 13, 1984, Montgomery County Circuit Court Judge Irma S. Raker declared the Burning Tree exemption violative of the ERA and severable from the remainder of the statutory scheme. She also enjoined the State from granting Burning Tree a tax preference as long as it discriminated on the basis of sex. *See Burning Tree Club v. Bainum*, 305 Md. 53, 59-62, 501 A.2d 817, 820 (1985).

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'Don't Play Golf,' Legislators Told," Washington Post, November 2, 1983 at B1, the Club's opposition to bills in later years was funneled through paid lobbyists and associations of clubs. Until 1986, these lobbying efforts, which focused on the alleged "snowballing" effect of repeal of the Burning Tree exemption on the tax breaks of social and fraternal clubs, were successful.

On appeal, a majority of judges agreed that the Burning Tree exemption violated the ERA, but a different majority concluded that the exemption was not intended by the General Assembly to be severable from the statutory ban on sex discrimination. *Burning Tree Club v. Bainum*, 305 Md. 53, 501 A.2d 817 (1985).[8] The result of this interpretation of legislative intent was that the sex discrimination ban was eliminated and Burning Tree and all other clubs receiving the tax preference could continue to discriminate on the basis of gender and retain their tax break.

Soon after the Court of Appeals decision, Senator Bainum introduced Senate Bill 483 to reinstate the prohi-

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[8] Three judges said that the Burning Tree exemption did not involve State action and was gender neutral, but, if unconstitutional, was not severable from the statutory ban on sex discrimination. 305 Md. at 62-79. However, even these members of the Court noted that "[f]rom the standpoint of sex discrimination, Ch. 870 is nearly a complete, intrinsic contradiction. It confers a benefit on the one hand and then takes it away almost entirely on the other." 305 Md. at 83. Three other judges, on the basis of decisions of this Court, found State action, a lack of gender neutrality and unconstitutional sex discrimination. They also would have severed the unconstitutional exemption. A seventh judge (Rodowsky), whose vote decided the case, held the Burning Tree exemption unconstitutional, but not severable. *Id.* at 85-88. In the course of his opinion, Judge Rodowsky noted that the Burning Tree statute was "an unconstitutionally discriminatory anti-discrimination law" because:

> "Once the General Assembly decides to address sex-based discrimination in an anti-discrimination statute which also prohibits discrimination on other bases, the E.R.A., in light of its underlying policy, prevents the General Assembly from conferring lesser benefits on persons who are objects of sex-based discrimination." *Id.* at 88.

bition on sex discrimination by country club recipients of the preferential tax assessment, but without the Burning Tree exemption. Although the bill, as introduced, would also have deleted the "specific days" and "specific times" exemption not challenged in litigation, an amendment by the Senate Budget and Taxation Committee left this provision in the law. This time the legislation passed and it became law July 1, 1986. Chapter 334, Laws of 1986. Just before it took effect, Burning Tree was advised by the Department of Assessments and Taxation that as of July 1, its real property was to be assessed at "full cash value".

On June 30, 1986, Burning Tree filed suit in the Circuit Court for Anne Arundel County to challenge the constitutionality of Chapter 334 as well as the application of the statute to its discriminatory practices. Specifically, the Club alleged that the statute: impaired the obligation of a contract in violation of Article I, §10 of the U. S. Constitution (Count One); resulted in a breach of contract (Count Two); was not intended to affect the Club's 1981 agreement with the State Department of Assessments and Taxation (Count Three); violated the Equal Rights Amendment by exempting other types of sex discrimination (Count Four); and constituted a special law prohibited by Article III, §33 of the Maryland Constitution. After both sides had moved for summary judgment and less than three weeks before a scheduled hearing before the trial judge, Burning Tree amended its complaint to assert a First Amendment freedom of association claim on behalf of its members.[9]

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[9] Because the First Amendment issue was raised so late in the litigation and was not the key issue in the case, no discov-

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Following a hearing in September, 1986, the Circuit Court on July 21, 1987, rejected all of the Club's attacks except for one. Piecing together the plurality opinions in *Burning Tree Club v. Bainum, supra,* the lower court found that on its face the "specific days" and "specific times" exemption for other clubs violated the ERA; and, in addition, the court felt bound by the *Bainum* decision to find this exemption not severable from the reenacted ban on discrimination.[10]

Maryland's highest court finally put an end to Burning Tree's string of ironic judicial victories. By a 5-2 majority, the Court agreed that the remaining exemption in the open space law for the "periodic" sex discrimination of the other clubs violated the ERA, but this time held that this provision was severable from the reinstituted ban on sex discrimination that would cost Burning Tree its tax break. *State v. Burning Tree Club, Inc.*, 315 Md. 254, 554 A.2d 366 (1989). In so doing, the Court rejected all other state and federal claims pressed by the

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ery was undertaken with respect to the issue. Thus, the record does not show the extent of the Club's indiscriminate policy of currying favor with high ranking male government officials, whether club members took business tax deductions for use of club facilities, whether the asserted policy of "no business discussions" was a rule honored in the breach, or the rationale for the Club's extensive non-resident membership policy.

[10] Although *Nollan v. Calif. Coastal Comm'n*, ___ U.S. ___, 107 S.Ct. 3141 (1987) had been decided nearly a month before issuance of the Circuit Court decision, Burning Tree did not seek to amend its complaint to assert a taking claim.

club.[11] The judges dismissed Burning Tree's freedom of association challenge. They criticized the notion that the right of association extended "to a sizable, all male organization devoted to playing golf," claiming immunity "from the sort of governmental interference complained of here." 315 Md. at 283. Contrary to suggestions in the Club's petition, the Court went on to note on the basis of size, selectivity and purpose, "Burning Tree has not established that it qualifies for the intimate associational rights" described in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987). In addition, the judges, relying on a long consistent line of decisions of this Court, concluded that the Club's asserted associational right to discriminate against women was not required to be subsidized with State taxes and was not being unconstitutionally conditioned. 315 Md. at 284-289. Finally, the Court held that Maryland had a compelling interest in "eliminating State supported sex discrimination" that could not have been achieved in a less restrictive manner than by enactment of the 1986 statute. 315 Md. at 289-290. Rejecting Burning Tree's impairment of contract claim, the Court emphasized that "[e]very Maryland contract entered with the State government since the enactment of the ERA" in 1972 has been subject to the constitutional ban on state-sanctioned sex discrimination,

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[11] The dissenters did not question the majority's conclusions on the federal questions raised by Burning Tree. In fact, in six years of litigation, not a single Maryland judge has seen any merit in the Club's Contract Clause and First Amendment claims. *See Burning Tree Club v. Bainum, supra*, 305 Md. at 105, n. 14.

that the 1986 statute "imposed no obligation on Burning Tree that was not imposed by valid laws and public policy in effect in 1981", when the Club's contract was extended, and that, in any event, the necessity of "elimination of state-sanctioned sex discrimination" justified any possible contract impairment. 315 Md. at 269-272.[12]

I. THE LAW IS WELL-SETTLED THAT A STATE'S DENIAL OF A TAX SUBSIDY TO A DISCRIMINATORY CLUB DOES NOT VIOLATE THE FIRST AMENDMENT OR CREATE AN UNCONSTITUTIONAL CONDITION.

Burning Tree struggles vainly to make this case the fourth private club/freedom of association decision of this Court in the last five years. *See New York State Club Ass'n v. City of New York*, 108 S.Ct. 2225 (1988); *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 107 S.Ct. 1940 (1987); and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). However, Burning Tree is less private and less deserving of associational rights than any club in the *Rotary, Jaycees* and *New York Club* trilogy; the State's interest here is even more compelling than those considered previously; and in another line of cases, this Court long ago established that the government can deny a tax break

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[12] The Court of Appeals did not decide any taking Claim. The issue was not raised in burning Tree's cross petition for certiorari in the Court of Appeals, nor in its appellate brief – not even in the "Questions Presented" and citation of relevant constitutional provisions required by the Maryland Rules of Procedure. *Nollan v. California Coastal Comm'n*, 107 S.Ct. 3141 (1987) was mentioned only in a footnote as a gloss on Burning Tree's Contract Clause argument.

or funding to a discriminatory entity without running afoul of either the First Amendment or the unconstitutional condition doctrine.[13]

A. No Associational Rights

Burning Tree is neither small, selective, privately funded nor operated solely for a private purpose. It hardly "epitomizes thousands of intimate all-male and all-female clubs and other groups that have long flourished in this society." Petition at 8.

The Club is larger than those affected by governmental regulation in *New York Club* – with hundreds of non-resident and honorary members. Its tradition of indiscriminately granting honorary membership to high

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[13] Under the weight of adverse authority, Burning Tree understandably strains to remove the label of "subsidy" from Maryland's open space tax preference. In essence, the Club contends that it obtains no subsidy because the State receives "full value" from the contractual relationship, *i.e.*, Burning Tree's preservation of open space saves the State the cost of acquiring park land. However, all tax exemptions must be "justified on the basis that the exempt entity confers a public benefit," *Bob Jones University v. United States*, 461 U.S. 574, 591 (1983). *See also* Md. Declaration of Rights, Article 15, requiring a State tax exemption to serve a "public purpose". Thus, all tax exempt entities could argue that they give the government "full value". This certainly would not mean that the State is not suffering a direct loss of tax dollars otherwise due or that its taxpayers are not shouldering a burden because of the tax break. *See Bob Jones University v. United States, supra*, 461 U.S. at 591 ("When the Government grants exemptions or allows deductions, all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors'.").

governmental officials cuts against the Club's assertion that it does not permit the mixing of social and business matters – an allegation the Court of appeals refused to accept uncritically. *See* 315 Md. at 281.

In addition, the Club is a longstanding participant in a unique State statutory program. All country clubs receiving the tax preference exercise a government function in the preservation of open space. *See Rotary Club, supra,* 107 S.Ct. at 1946 (The public purposes behind the club's service activities "do not suggest that kind of private or personal relationship to which we have accorded protection. . . ."); *Evans v. Newton,* 382 U.S. 296, 301 (1966) ("The service rendered even by a private park . . . is municipal in nature."). And, in exchange for receiving substantial tax breaks, they are heavily regulated. State authorities have investigated and must investigate the membership and guest policies of these clubs and even have subpoena powers to examine club membership data. Indeed, when Burning Tree agreed to participate in the open space program decades ago, it surrendered its ability to exercise selectivity in membership on the basis of race, color, creed or national origin. Its bare desire to discriminate against women is not deserving of overriding constitutional protection. *See Hishon v. King and Spaulding,* 467 U.S. 69, 78 (1984). Finally, with the acceptance of nearly a quarter-century of State tax support, the Club's alleged associational right to discriminate against women has disappeared. *See Green v. Connally,* 330 F.Supp. 1150, 1166 (D.D.C. 1971), *aff'd sub. nom. Coit v. Green,* 404 U.S. 997 (1971). In light of all these factors, clearly Burning Tree is the type of club the State could regulate within the principles espoused in *Jaycees, Rotary Club* and *New York Club.*

B. No Right to Tax Subsidy

Even if Burning Tree had demonstrated a protected right to freedom of association, it would not constitutionally guarantee its right to a tax subsidy.

The Club asserts that this case presents an opportunity for this Court to reconcile *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983) with *Speiser v. Randall*, 357 U.S. 513 (1958). In fact, decisions of this Court have clearly defined the limits of the unconstitutional conditions doctrine and it is clear that the refusal of the government to subsidize discrimination with tax dollars does not violate the doctrine. The result in this case is governed by a long line of cases where this Court has held the fact that "the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires State support for such discrimination." *Norwood v. Harrison*, 413 U.S. 455 (1973). *Accord, Grove City College v. Bell*, 465 U.S. 555, 575-576 (1984); *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Green v. Connally*, 330 F.Supp. 1150 (D.D.C.), *aff'd sub. nom. Coit v. Green*, 404 U.S. 997 (1981).

In *Speiser v. Randall, supra*, this Court held invalid a California law that denied a tax exemption to veterans who had engaged in advocacy of the overthrow of the United States or the state if that advocacy could be criminally punished consistent with the First Amendment. The Court assumed, without deciding, that the State could withhold the exemption on that basis, *Speiser* at 520, but found the provision invalid because it placed the burden of proof on the veteran. In the view of the Court, placing this burden on the veterans would cause them to refrain

from protected, as well as unprotected speech, and thus "produce a result which the State could not command directly." *Speiser,* at 526.

The differences between this case and *Speiser* and its progeny are striking. First, as discussed above, the State could require Burning Tree Club not to discriminate at all. Any right of association petitioners enjoy is clearly outweighed by the State's compelling interest in eliminating sex-based discrimination.

Furthermore, unlike the requirement in *Speiser,* the bar on sex discrimination cannot be said to be directly aimed at the "suppression of dangerous ideas." *Speiser,* at 519. It does not act to suppress, limit or chill speech, or to favor one viewpoint over another. *Cf. Roberts v. United States Jaycees, supra,* 468 U.S. at 623. Instead, as in other cases where the Court has held that a decision not to subsidize the exercise of constitutional rights does not impose an unconstitutional condition on that exercise, the basis for withholding the exemption is content-neutral. *See, Lyng v. International Union, UAW,* 108 S.Ct. 1184 (1988); *Regan v. Taxation With Representation of Washington, supra; cf. FCC v. National Citizen's Com. for Broadcasting,* 436 U.S. 775 (1978) (multiple ownership rules do not impose unconstitutional condition).

The Court has repeatedly upheld the ability of the Legislature to condition receipt of a government financial benefit. For example, in *Grove City College v. Bell,* 465 U.S. 555 (1984), the Court, without extended discussion, held that Congress could condition federal assistance on compliance with Title IX of the Education Amendments of 1972, § 901(a), 20 U.S.C. § 1681(a), without infringing the

First Amendment rights of the college or its students. And, in *Norwood v. Harrison*, 413 U.S. 455 (1973), the Court held that the state could not aid discrimination by providing free textbooks for loans to children attending schools that discriminated on the basis of race, and that withholding that aid did not violate the rights of parents to send their child to the private school of their choice. *See also, Bob Jones University v. United States, supra,* and *Green v. Connally, supra* (Both holding that denial of a tax exemption to schools that discriminate on the basis of race does not violate the First Amendment.).[14]

Even outside the area of tax subsidization of discrimination, which is definitively controlled by decisions other than *Speiser*, there is no need to reconcile a purported conflict between *Regan* and *Speiser*. *Regan* itself distinguishes *Speiser*, contrasting the denial of a tax benefit *because* a person exercises a constitutional right with the refusal to pay for the exercise of the right out of public moneys. *Regan v. Taxation With Representation of Washington, supra*. 461 U.S. at 545.[15]

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[14] The one court to erroneously accord sweeping associational rights to discriminatory clubs concluded at the same time that a state would not violate the First Amendment by removing a tax exemption for a discriminatory club. *United States Jaycees v. McClure*, 709 F.2d 1560, 1575 (8th Cir. 1983), *reversed on other grounds*, 468 U.S. 609 (1984).

[15] Under *Regan*, it is constitutionally irrelevant that it may be more expensive for the Club to continue to discriminate. 461 U.S. at 549-50. Although Burning Tree has complained loudly of the financial consequences of the loss of its tax break, one of its members, former Senator Barry Goldwater, stated that the

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Finally, if there were even the slightest bit of merit to the Club's position on unconstitutional conditions, it would call into question federal tax statutes that prevent racial discrimination by certain recipients of income tax exemptions, *see Bob Jones University v. United States, supra,* and 26 U.S.C. § 501(i), which denies a tax exemption to social clubs with a charter or bylaw that "contains a provision which provides for discrimination against any person on the basis of race, color or religion,"[16] as well as Title VI of the Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d, and Title IX of the Education Amendments Act.

C. Compelling State Interest

Even if the State had attempted to merely regulate Burning Tree's discrimination and had infringed on the association rights of Burning Tree members, the 1986 legislation would be justified because the State has a compelling interest in eliminating private discrimination against women. *New York State Club Ass'n v. New York City, supra,* 108 S.Ct. at 2235, n. 5; *Board of Directors of*

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loss of the tax preference "will not make or break the club. It might make dues a little higher. . . .They should find out what the tax is, divide it by the number of members and then add that on to everyone's dues. That shouldn't be too terribly much." V. Churchville, "Burning Tree Tax Exemption Ruled Illegal," Washington Post, September 14, 1984, at A1.

[16] The social and fraternal clubs Burning Tree purports to represent are more affected by 26 U.S.C. § 501(i), which has never been challenged, than by Maryland's unique country club anti-discrimination law, which has not been emulated in any other jurisdiction.

Rotary International v. Rotary Club, supra, 481 U.S. at 549; *Roberts v. United States Jaycees, supra,* 468 U.S. 623; *Bob Jones University v. United States, supra,* 461 U.S. at 604.

Burning Tree unsuccessfully seeks to disparage this interest as regulating the membership policies of just a single club. However, because the *Bainum* decision invalidated in toto that statutory ban on sex discrimination, the 1986 reinstitution of that ban applied to *all* clubs receiving the tax preference, not just Burning Tree. More importantly, at stake here is not just a compelling interest in eliminating private discrimination. Just a few short months ago, this Court stated that "[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *City of Richmond v. J. A. Croson Co.,* 109 S.Ct. 706, 720 (1989). The necessary byproduct of State regulation of all clubs in the 1986 statute was the elimination of State sanctioned and State supported sex discrimination. This fact, above all, makes the Maryland law immune from constitutional attack.

II. NO SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION IS RAISED BY BURNING TREE'S CONTRACT CLAUSE CLAIM.

It has been more than a decade since this Court invalidated a state law as unconstitutionally impairing the obligation of a public contract. *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977). This case is a most unworthy candidate for the Court to return to the area.

The Maryland statute did not seek to retroactively impact tax years before July 1, 1986. It affected an area of longstanding State regulation and resulted in a change in the law that was clearly foreseeable before Burning Tree unilaterally extended its agreement. *See Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 413-416 (1983). The 1986 law had its genesis in the State's attempt to comply with the 1972 Equal Rights Amendment, which clearly predated and superseded the Club's 1981 contract.

Finally, the law was justified by compelling reasons that could not be achieved by less restrictive alternatives. Burning Tree erroneously contends that the 1986 legislation was aimed solely at its tax break and not aimed at a broad and general social and economic problem. The statute at issue here reinstitutes a ban on sex discrimination for all clubs receiving the tax break, not just Burning Tree. It removes official State support of and taxpayer financed generosity to private discriminatory activities. Clearly, this is a sufficiently broad and general social or economic problem. *City of Richmond v. J. A. Croson Co., supra,* 109 S.Ct. at 720. These factors, the uniqueness of the Maryland open space/anti-discrimination statute, and the undoubted correctness of the decision below, lead to the conclusion that this issue should not be reviewed.

III. BURNING TREE HAS NOT PROPERLY RAISED A SIGNIFICANT OR MERITORIOUS CLAIM THAT A LAW BANNING SEX DISCRIMINATION UNCONSTITUTIONALLY TAKES ITS PROPERTY WITHOUT JUST COMPENSATION.

In reliance upon *Nollan v. California Coastal Comm'n*, 107 S.Ct. 3141 (1987), Burning Tree now contends that the

1986 statute has taken away its alleged property right to exclude women because it claims that no reasonable nexus exists between its maintaining of open space for the State and a ban on sex discrimination in its membership and guest policies. This contention is ridiculous.

First, this issue was not decided in the State courts below. Nor was it properly raised or argued. Burning Tree could have amended its complaint in the trial court to assert a *Nollan* claim. It could have mentioned the issue in its September 1987 cross petition for certiorari in the Court of Appeals. It could have argued a taking issue in its brief, rather than confining *Nollan* to a footnote in the course of its Contract Clause argument. It took none of these actions. Therefore, review should be denied for this reason alone. *Board of Directors of Rotary International v. Rotary Club, supra,* 107 S.Ct. at 1948; *Cardinale v. Louisiana,* 394 U.S. 437 (1969).

Second, and more importantly, *Nollan* clearly has no application to government imposed conditions on the receipt of a tax benefit or funding. An entity seeking tax exempt status "must serve a public purpose and not be contrary to established public policy." *Bob Jones University v. U.S., supra,* 461 U.S. at 592. Burning Tree's discrimination against women is so at odds with established public policy "as to undermine any public benefit that might otherwise be conferred" through its preservation of open space. *Id.* at 592. There is a rational, if not compelling, connection between the ban on sex discrimination and the Club's participation in a tax-subsidized open space program. The Club's operation is subsidized by the tax contributions of all Maryland citizens, male and female; and half the citizens of the State are denied the chance

even to see or visit the open spaces preserved by burning Tree's agreement. The Club's comparison of its governmental function to maintaining a park is revealing. If the State totally excluded women from a public park, it would be flagrantly violating the State and Federal Constitutions. To lend its tax support to a club serving the same governmental purpose without banning discrimination is equally offensive.

CONCLUSION

The State contends that review is not necessary by this Court to consider the well-settled or unmeritorious issues pressed by Burning Tree. For all of the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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